Supreme Court, U.S.
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No. 87-1343

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

EDWIN T. SHIMODA, Administrator, Oahu Community Correctional Center, and MICHAEL KAKESAKO, Corrections Division Administrator,

Petitioners,

vs.

EMMET AKAO, ALLEN V. TRIPP, AND GARRICK UMIAMAKA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Charles R. Breyer
William H. Orrick, III
Coblentz, Cahen, McCabe & Breyer
One Embarcadero Center
35th Floor
San Francisco, California 94111
Telephone: (415) 391-4800

Counsel for Respondents

15pp

NTZ, CAHEN,
E & BREYER
NEYS AT LAW
ROUP INCLUDING
NAL CORPORATIONS
NORTH FLOOR
ADERO CENTER
ISCO, CA 94111

QUESTION PRESENTED

Whether the incarcerated pro se plaintiffs in this civil rights action should be granted the opportunity to amend their complaint before dismissal for failure to state a claim.

LENTZ, CAHEN,
ABE & BREYER
ORNEYS AT LAW
NERSHIP INCLUDING
IONAL CORPORATIONS
TY-FIFTH FLOOR
ARCADERO CENTER
NCISCO, CA 94111

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E & BREYER
NEYS AT LAW
RSHIP INCLUDING
NAL CORPORATIONS
-FIFTH FLOOR
ACADERO CENTER
CISCO, CA 94111

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AL CORPORATIONS
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CADERO CENTER
ISCO, CA 94111

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& BREYER
NEYS AT LAW
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AL CORPORATIONS
FIFTH FLOOR
EADERO CENTER
ISCO, CA 94111

Respondents Emmet Akao, Allen V. Tripp and Garrik Umiamaka respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 832 F.2d 19 (1987), amending 820 F.2d 302 (1987).

STATEMENT OF THE CASE

This unremarkable case concerns the United States District Court for the District of Hawaii's dismissal of the pro se complaint of three inmates at the Oahu Community Correctional Center, who had alleged pursuant to 42 U.S.C. §1983 that they were injured because overcrowded conditions at the prison had increased stress, tension, communicable diseases and violence among prisoners. In granting petitioners' motion to dismiss pursuant to Rule 12(b)(6) of Federal Rules of Civil Procedure, the District Court neither allowed respondents to amend their complaint (Pet., 7a-9a) nor to appear at the hearing to explain their claims. (App. 1a) The United States Court of Appeals for the Ninth Circuit reversed, observing that although plaintiffs' allegations were not sufficiently specific to state a cause of action, it was not "beyond doubt" that they could do so by amendment. (Pet., 3a)

That is all this case is about. Petitioners describe in great detail in their Statement of the Case the problems the State of Hawaii has in managing its prison system, but those difficulties were not part of the record before the United States

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& BREYER
EYS AT LAW
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ADERO CENTER
SCO, CA 9411

District Judge when he dismissed plaintiffs' case, and they were not before the Ninth Circuit (Judges Wallace, Wiggins and Kennedy) when it reversed the trial court's decision. Neither were arguments concerning immunity, which petitioners first raised after the Ninth Circuit decided the appeal.

In sum, the sole issue before this Court is whether respondents should be allowed to amend their complaint. As it is not beyond doubt that they can state a claim for relief, the Court should deny the writ.

REASONS FOR DENYING THE WRIT

1. THIS IS A PLEADING CASE WHICH WAS PROPERLY DECIDED

The decision below was correct. Dismissal for failure to state a claim is rarely proper. United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). This is particularly true when a plaintiff proceeds pro se:

> As the Court unanimously held in Haines v. Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct.594 (1972) a pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Id. at 520-521, 30 L.Ed.2d 652, 92 S.Ct.594, quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L.Ed.2d 80, 78 S.Ct.99 (1957).

Estelle v. Gamble, 429 U.S. 97, 106 (1976).

The Ninth Circuit followed Estelle v. Gamble. Respondents had alleged that they were injured by overcrowded conditions

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CADERO CENTER
ISCO, CA 94111

which had increased stress, tension, communicable diseases and violence among prisoners. (Pet., 19a) The Ninth Circuit held:

> It is true that the prisoners' allegations are not sufficiently specific and do not allege that they personally have suffered cruel or inhuman punishment, but we cannot hold that it is "beyond doubt" that they could not do so.

(Pet., 3a) The Ninth Circuit accordingly reversed, and allowed respondents the opportunity to amend their complaint. That decision should not be disturbed.

2. THE DECISION BELOW DID NOT REACH THE IMMUNITY QUESTIONS RAISED IN THIS COURT BY PETITIONERS

The Ninth Circuit's decision did not hold, implicitly or explicitly, that the petitioners are or are not entitled to immunity. This is a pleading case, and all the Ninth Circuit decided was that the plaintiffs were entitled to a second chance to state a claim. The decision, accordingly, does not directly or indirectly conflict with the decisions of this Court regarding the qualified immunity doctrine or the Eleventh Amendment. Those questions cannot be reached until a pleading which states a claim is filed.

Under the qualified immunity principles reaffirmed in Anderson v. Creighton, 107 S.Ct. 3034 (1987), the rights petitioners are alleged to have violated must have been "clearly established," or be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 107 S.Ct. at 3039. Petitioners

NTZ, CAHEN,
E & BREYER
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contend under Anderson that they are entitled to immunity because overcrowding, alone, is not a constitutional violation and because the Court of Appeals' relied on Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984), a case which was decided after plaintiffs' case was filed. Each argument is spurious.

As a threshold matter, there are simply no facts alleged, much less developed, on which the Court can base an analysis of the immunity questions raised by petitioners. Whether a defendant is entitled to qualified immunity depends on what the allegedly unlawful official action is, which the Ninth Circuit found that respondents had not pled with sufficient specificity. Until it is so pled, and petitioners' conduct fleshed out in discovery, it is impossible to know whether the "clearly established" legal rules at the time render petitioners liable for respondents' claims.

Further, while overcrowding is not a constitutional violation, injuries suffered as a result of overcrowding violate the Eighth Amendment if they "deprive inmates of the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). If the level of shelter and sanitation, increased violence, and injury to mental health caused by overcrowding injured respondents and deprived them of the minimal civilized measure of life's necessities, then they may state a claim and obtain relief. See, e.g., Hutto v. Finney, 437 U.S. 678 (1978). Thus, petitioners' reliance on Union County Jail Inmates v. DiBuono, 713 F.2d 984 (3rd Cir. 1983) which considers

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E & BREYER
NEYS AT LAW
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AL CORPORATIONS
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CADERO CENTER
ISCO, CA 94111

claims based on overcrowding but not its effect, and the space allotted to inmates in Toussaint v. Yockey, is misplaced. It is the effect of overcrowding--not comparisons of the space in which inmates are housed--which a court must consider in determining whether a constitutional violation exists.

Nor did claims arising under 42 U.S.C. §1983 for violations of the Eighth Amendment originate with Toussaint v. Yockey. Each of the effects of overcrowding alleged by plaintiffs formed the basis of an Eighth Amendment violation at the time the complaint was filed: inadequate shelter and sanitation, e.g., Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982); increased violence, id.; and injury to mental well being, e.g., Spain v. Procunier, 600 F.2d 189, 200 (9th Cir. 1979). Whether petitioners violated clearly-established law depends on the facts ultimately pled and proved, not on the Ninth Circuit's citation of a case decided after the filing of respondents' complaint.

Petitioners also assert that the Court should rule on their immunity defenses now because such questions should be resolved "at the earliest possible stage of litigation." Anderson v. Creighton, 107 S.Ct. at 3042. Before respondents have stated a claim, however, it is impossible to consider the immunity questions. In Anderson v. Creighton, the trial court reached the immunity question on summary judgment. Here, petitioners did not even raise their immunity defenses in the trial court. Due process requires that respondents be allowed to

FZ, CAHEN,
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ADERO CENTER
SCO, CA 94111

state their claim and to introduce evidence in opposition to a properly noticed motion to establish that qualified immunity does not shield petitioners.

Finally, petitioners argue that if this action is brought against them in their official capacities, it is barred by the Eleventh Amendment. Before addressing that contention, the trial court must first determine whether the complaint is brought against defendants solely in their official capacities (which it almost assuredly is not). Then it must consider whether the State has waived its immunity and consented to suit in federal court. Welch v. Dept. of Highways & Public Trahsp., 107 S.Ct. 2941, 2946 (1987). Respondents are entitled to establish through discovery that such a waiver occurred by means of the consent decree in Spear v. Ariyoshi, No. 84-1104 (D.Haw. June 12, 1985) or by other conduct. Until these preliminary questions are resolved through pleadings and discovery, however, there is no basis on which to adjudicate petitioners' sovereign immunity defense.

3. RESPONDENTS' DAMAGES CLAIMS WERE NOT PRECLUDED IN THE SPEAR V. ARIYOSHI CONSENT DECREE.

Petitioners also claim that respondents, as class members in Spear v. Ariyoshi, No. 84-1108 (D.Haw. filed June 12, 1985), waived their claims for monetary damages in a consent decree which settled a class action regarding unconstitutional conditions which existed in the Hawaii state prison system.

NTZ, CAHEN,
E & BREYER
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ISCO, CA 94111

While this is an issue of little moment for this Court, the Ninth Circuit's interpretation of the waiver clause was correct and cert should not be granted to review it.

The waiver clause in the consent decree states in full:

> N. By entering into this decree, plaintiffs and members of the plaintiff class are not waiving any rights to pursue individual claims for declaratory, injunctive, and/or monetary relief. The only claims against defendants settled herein are claims for injunctive relief of a general nature as detailed in the complaint filed in this case and which are applicable to more than the individual circumstances of a particular plaintiff class member.

(Pet., 39a, 40a) The clause is unambiguous. Responents did not waive any claims for monetary relief.

The first sentence describes claims which are not waived. "Members of the plaintiff class are not waiving any rights to pursue individual claims for declaratory, injunctive, and/or monetary relief." Id.; emphasis supplied. The second sentence describes claims which are waived: "The only claims against defendants settled herein are claims for injunctive relief of a general nature . . . ." Id.; emphasis supplied. Claims "detailed in the complaint" and "claims which are applicable to more than the individual circumstances of a particular plaintiff class member" modify and define more particularly the claims for injunctive relief which have been waived. Id.

The proper interpretation of the waiver clause, as the motions panel for the Ninth Circuit found, is that respondents are precluded from bringing an individual action for injunctive

TZ, CAHEN,
& BREYER
EYS AT LAW
IP INCLUDING
L CORPORATIONS
IFTH FLOOR
ADERO CENTER
800, CA 94111

relief based on the effects of overcrowding in their prison. (Pet., 5a) They are not precluded, however, from bringing an individual action concerning overcrowding if they suffered a compensable injury as a result of the overcrowding. The consent decree does not preclude every individual action pursuant to 42 U.S.C. §1983 arising in the Hawaii state prison system, as petitioners would contend. Neither the language of the waiver clause nor its intent allows such a result.[1]

The meaning of the waiver clause is clear. The motions panel correctly determined that plaintiffs' damages action could proceed. That determination should not be disturbed.

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[1] Respondents repeat a misleading half truth when they assert that petitioners considered dismissing their appeal because of the effect of the consent decree. When respondents' attorneys were appointed pro bono counsel on September 30, 1986, we did not receive the appellate record and were unaware of the consent decree, petitioner's mootness argument, or the motions' panel's decision. Out of courtesy to petitioners, respondents extended petitioners' time to file a responding brief in the Court of Appeals when we learned of the existence of the consent decree and petitioners' mootness argument. (Pet., 82a) After obtaining a copy of the decree, however, we told petitioners to proceed with their briefing since it was obvious that respondents' claims were not mooted by the consent decree. Id.

Z. CAHEN,
L. BREYER
ES AT LAW
UP INCLUDING
CORPORATIONS
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DERO CENTER
CO, CA 94111

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

COBLENTZ, CAHEN, McCABE & BREYER

By _____
Charles R. Breyer
William H. Orrick, III
Attorneys for Respondents

LENTZ, CAHEN,
ABE & BREYER
RNEYS AT LAW
NERSHIP INCLUDING
SIONAL CORPORATIONS
TY-FIFTH FLOOR
BARCADERO CENTER
NCISCO, CA 94111

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EMMET AKAO, ALLEN TRIPP, GARRICK UMIAMAKA, Plaintiffs,	)	CIVIL NO. 83-1067
vs.	)	
MICHAEL KAKESAKO, Defendant.	)	

FILED IN THE UNITED STATES DISTRICT COURT DISTRICT OF HAWAII

DEC 19 1983

at 8 o'clock and 05 min. P.M.

WALTER A. Y. H. CHINN, CLERK

ORDER REGARDING PLAINTIFFS' REQUEST TO APPEAR AT ORAL ARGUMENT

Insofar as the court has determined that oral argument will not be required for the defendant's Motion to Dismiss originally scheduled for hearing on December 27, 1983, the plaintiffs' request to appear at such hearing is DENIED. The court will consider plaintiffs' request to appear at later proceedings on an individual basis, as the matters arise.

SO ORDERED.

DATED: Honolulu, Hawaii, DEC 16 1983

UNITED STATES DISTRICT JUDGE